

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 26/ UC 600

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Respondent.

QWEST'S MEMORANDUM IN
OPPOSITION TO NPCC'S MOTION FOR
PARTIAL SUMMARY JUDGMENT AND
IN SUPPORT OF QWEST'S CROSS-
MOTION FOR SUMMARY JUDGMENT

CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	3
A.	The Payphone Orders.....	3
1.	The First Payphone Order	4
2.	The Reconsideration Order	5
3.	The Clarification Order	7
4.	The Waiver Order	8
B.	Qwest's Oregon Compliance with the Payphone Orders	11
1.	PUC filings.....	11
2.	Qwest's certification of compliance with the payphone orders	12
C.	Qwest Did Not Rely Upon the Waiver Order	13
D.	The Cases NPCC Relies Upon Are Clearly Distinguishable.....	18
E.	Oregon Law Prohibits a Refund	20
F.	NPCC's Claim Is Barred by the Two-Year Statute of Limitations	22
G.	NPCC's Claim Is Barred by Res Judicata	24
H.	NPCC Lacks Standing To Seek Refunds for its Members	25
III.	CONCLUSION.....	26

I. INTRODUCTION

Qwest Corporation ("Qwest")¹ respectfully submits this memorandum in opposition to the motion of complainant, The Northwest Public Communications Council ("NPCC"), for partial summary judgment on the issue of Qwest's alleged liability to make a refund to NPCC's members ("NPCC's Motion"). This same memorandum is submitted in support of Qwest's cross-motion for summary judgment dismissing NPCC's Complaint in its entirety. Qwest agrees with NPCC that the Commission can and should decide the liability issue in this case based upon undisputed facts. NPCC, however, both ignores the material facts and misstates the applicable law. Based upon the material undisputed facts as submitted by Qwest, the Commission should dismiss NPCC's Complaint.

NPCC's claim is based upon a 1997 order of the FCC, commonly referred to as the Waiver Order. As NPCC acknowledges, any refund obligation as claimed in this case requires a determination that Qwest "relied upon" the 45-day extension granted in the Waiver Order. NPCC, however, fails to present any facts to support its assertion that Qwest relied upon the Waiver Order. Moreover, NPCC's argument is based upon a gross misreading of the Waiver Order. For these reasons, the Commission should deny NPCC's Motion.

The undisputed facts show that Qwest did not rely upon the Waiver Order in any respect. The FCC's payphone orders, issued in 1996 and 1997, required LECs, among other things, to file intrastate tariffs for certain payphone services by January 15, 1997, to be effective by April 15, 1997, complying with certain requirements including the so-called "new services test." In early April 1997, all RBOCs jointly requested a 45-day extension to comply with portions of those orders. The FCC granted that extension in the Waiver Order, giving the RBOCs additional time to review their existing tariffs to decide whether they were adequate or whether they should file

¹ "Qwest" includes its predecessor U S WEST Communications, Inc. ("U S WEST"). On occasion, this memorandum will use the term "U S WEST" when that is more historically accurate.

new tariffs to comply with the federal requirements. In requesting that extension, the RBOCs volunteered to make a refund, but only if they decided to file new tariffs by May 19, 1997, instead of relying upon their existing tariffs to satisfy the federal requirements, and if those new tariffs had lower rates than were in effect on April 15, 1997.

Some RBOCs, like BellSouth in four of the six cases relied upon by NPCC, chose to file new tariffs by May 19, 1997, and did not contest their obligation to make a refund. Other RBOCs, like Qwest and Verizon-New York, chose to rely upon their existing tariffs and did not make any new filings by May 19, 1997. These RBOCs did not rely upon the Waiver Order, as an appellate court in New York recently decided in denying a refund claim identical to NPCC's, *regardless of whether the tariffs that were effective April 15, 1997 are ultimately determined to comply with the federal requirements.*

Qwest complied with the payphone orders by filing Oregon tariffs on January 15, 1997, which the Commission approved on April 1, 1997, and which became effective on April 15, 1997. Qwest simply did not rely upon the Waiver Order, because Qwest did not file any new tariffs within the 45-day extension granted by the order. This conclusion is unchanged by the fact that a court recently decided that the Commission should review Qwest's payphone rates under the new services test. For these reasons, NPCC cannot establish any obligation of Qwest to make a refund to NPCC's members, and its Complaint should be dismissed.

Even if NPCC could establish the basis for a refund, which it cannot, its Complaint should be dismissed for three additional reasons. First, NPCC failed to bring this claim within the two-year limitations period provided by federal law for bringing such claims. Second, NPCC's claim is barred by res judicata. Third, NPCC lacks standing to recover refunds for its members.

2- QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM

II. ARGUMENT

A. The Payphone Orders

NPCC's claim for a refund is based on an overbroad and incorrect reading of the Waiver Order, as well as an erroneous factual assumption. Because Qwest did not rely on the short extension granted in the Waiver Order, it has no legal obligation to make a refund of payphone service charges. In order to fully appreciate the limited scope of the Waiver Order, it is useful to understand the FCC's three prior payphone orders.²

The FCC issued the payphone orders to meet the requirements of Section 276 of the Telecommunications Act of 1996. Section 276(a) prohibits BOCs from subsidizing or discriminating in favor of their own payphone services. Section 276(b) required the FCC to issue regulations to promote competition in payphone services. Specifically, it required the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every intrastate and interstate call completed using their payphone" 47 U.S.C. § 276(b)(1)(A). It also required the FCC to issue regulations to discontinue carrier access charge payphone service elements and subsidies from basic exchange and exchange access revenues for LEC payphones. 47 U.S.C. § 276(b)(1)(B). Section 276 further required nonstructural safeguards for BOC payphones, to implement the requirements of 47 U.S.C. § 276(a), and equal rights for BOCs and independent payphone service providers

² The FCC's first payphone order was issued on September 20, 1996 in CC Docket No. 96-128, *In the Matter of Implementation of the Pay Telephone Reclassification Provisions of the Telecommunications Act of 1996*, FCC 96-388, 11 FCC Rcd 20541 (1996) ("First Payphone Order"). The FCC's second order, its Order on Reconsideration, was issued on November 8, 1996, FCC 96-439, 11 FCC Rcd 21233 (1996), also in CC Docket 96-128 (the "Reconsideration Order"). The FCC issued a third order, clarifying a few items that remained uncertain following the Reconsideration Order on April 4, 1997, and granting a limited waiver of certain federal filing requirements of the previous orders, DA 97-678, 12 FCC Rcd 20997 (1997) (the "Clarification Order"). On April 15, 1997, the FCC granted LECs a limited waiver until May 19, 1997, to comply with certain intrastate filing requirements of the foregoing orders, DA 97-805, 12 FCC Rcd 21370 (1997) (the "Waiver Order"). Together, these orders are referred to as the "payphone orders."

("PSPs") to negotiate with location providers on the choice of presubscribed intraLATA and interLATA carriers. 47 U.S.C. § 276(b)(1)(C) - (E).

The payphone orders implement these requirements, including a per-call compensation system for all PSPs. Non-LEC PSPs were entitled to compensation from the effective date of the First Payphone Order. With respect to LEC payphones, however, the orders tie eligibility for compensation to compliance with the other requirements of Section 276 that apply to LECs in general and BOCs in particular. The FCC interpreted Section 276 to require that LECs remove subsidies from their rates and implement the non-structural safeguards before they could receive compensation for calls originating from their payphones. First Payphone Order, ¶ 127. The instant case turns upon the FCC's intrastate tariff filing requirements.

1. The First Payphone Order

The FCC issued the First Payphone Order on September 20, 1996, addressing all of the issues required by Section 276. Much of the order discusses the appropriate parameters of the required per-call compensation plan. The most pertinent parts of the order for purposes of this case are the sections relating to the elimination from LEC rates of subsidies for LEC payphones, implementing the requirements of 47 U.S.C. § 276(b)(1)(B), as well as the non-structural safeguards, implementing the non-discrimination requirement of 47 U.S.C. § 276(a)(2).

The FCC first decided that ILECs "must offer individual central office coin transmission services to PSPs under nondiscriminatory, public, tariffed offerings if the LECs provide those services for their own operations." First Payphone Order, ¶ 146. The FCC required this so that PSPs could offer payphone service using either "smart" or "dumb" payphones.³ *Id.* The FCC further stated, "[b]ecause the incumbent LECs have used central office coin services in the past, but have not made those services available to independent payphone providers for use in their

³ Central office coin services provided on a public access line ("PAL") are sometimes referred to as a "smart" line, or "smart PAL," which allows a PSP to use a "dumb" payphone. "Smart" payphones have such features built-in, and PSPs need only a basic access line ("basic PAL") to use them.

provision of payphone services, we require that incumbent LEC provision of coin transmission service on an unbundled basis be treated as a new service" subject to the "new services test." *Id.* The order required ILECs to file tariffs for those services with the FCC by January 15, 1997. *Id.* The FCC did not require unbundling of such features; rather it required "that any basic transmission services provided by a LEC to its own payphone operations must be available under tariff to other payphone providers" *Id.*, ¶ 148.

The discussion that followed concerned the removal of subsidies. The FCC concluded that ILECs are required to remove the interstate portion of payphone costs from their interstate CCL charges. First Payphone Order, ¶ 181. The FCC required ILECs to file such revised tariffs with the FCC by January 15, 1997, to be effective no later than April 15, 1997. *Id.*, ¶ 183. The order also required ILECs "to remove from their intrastate rates any charges that recover the costs of payphones. Revised intrastate tariffs must be effective no later than April 15, 1997." *Id.*, ¶ 186. The FCC required the states to "determine the intrastate rate elements that must be removed to eliminate any intrastate subsidies within this time frame." *Id.* The FCC clarified in its ordering paragraphs that LECs are required to file all of the tariffs required by paragraphs 180 to 187 on January 15, 1997, to be effective April 15, 1997. *Id.*, ¶ 370.

2. The Reconsideration Order

On November 8, 1996, the FCC issued the Reconsideration Order, revising limited provisions of the First Payphone Order. The FCC reiterated its conclusion that ILECs must offer central office coin transmission services and any other "basic transmission services provided by a LEC to its own payphone operations" to PSPs under public tariffs, and that such services are subject to the new services test. Reconsideration Order, ¶¶ 146, 148. Upon reconsideration, the FCC ordered LECs to file these tariffs with the states, and not the FCC. *Id.*, ¶ 162. Thus, the FCC ordered that: "LECs must file intrastate tariffs for these payphone services [basic payphone services] and any unbundled features they provide to their own payphone services." Reconsideration Order, ¶ 163. The FCC required these tariffs to be: (1) cost-based;

5- QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM

(2) consistent with Section 276 with regard, for example, to the removal of subsidies; and
(3) non-discriminatory. *Id.* "States must apply these requirements and the Computer III guidelines [the new services test] for tariffing such intrastate services." *Id.* The FCC required that these tariffs "be filed no later than January 15, 1997 and must be effective no later than April 15, 1997." *Id.*

The FCC also stated: "We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." *Id.* "States unable to review these tariffs may require the LECs operating in their states to file these tariffs with the Commission [the FCC]." Significantly for this case, the FCC also ruled: "Where LECs have already filed intrastate tariffs for these services, states may . . . conclude: (1) that existing tariffs are consistent with the requirements of the Report and Order as revised herein; and (2) that in such case no further filings are required." *Id.*

The FCC ruled that LECs would be eligible for per-call compensation "like other PSPs" when they have completed the FCC's requirements for implementing the payphone regulatory scheme. *Id.*, ¶ 131. Specifically, the FCC stated that, in order to receive compensation, a LEC must be able to certify several things. As far as intrastate tariffs are concerned, the FCC required a LEC to be able to certify only that (a) "it has in effect intrastate tariffs for basic payphone services (for 'dumb' and 'smart' payphones);" and (b) "it has in effect intrastate and interstate tariffs for unbundled functionalities associated with those lines." *Id.* Significantly, the Reconsideration Order required LECs to "be able to certify" their compliance, based upon effective tariffs, in order to receive compensation; it did not require, for example, that the filed rates were determined by a court of last resort to be in compliance by that time, nor did it specify any consequence other than ineligibility to receive compensation for a LEC's inability to make a certification of compliance.

3. The Clarification Order

On April 4, 1997, the FCC issued the Clarification Order, clarifying and providing a limited waiver of the federal tariff filing requirements of the previous orders, which required federal tariffs to be filed by January 15, 1997 for certain unbundled payphone features and functions. The FCC found that LECs had not filed the required tariffs for all of the unbundled features and functions, and clarified the requirement. It also concluded that the BOCs had made a good faith effort to comply with the FCC's requirements and waived the January 15, 1997 filing deadline and April 15, 1997 effective date for the required federal tariffs. Under the terms of this waiver (which is not at issue in this case), any LEC that filed the required federal tariffs by May 19, 1997, to be effective within 15 days after filing, would be eligible to receive compensation as of April 15, 1997, as long as the LEC met all the other requirements of the Reconsideration Order. Clarification Order, ¶ 21. If a LEC failed to make the required filing by May 19, 1997, or if the tariffs were not effective within 15 days after filing, the LEC would not be eligible to receive payphone compensation as of April 15, 1997. *Id.*

The FCC also took that opportunity to clarify the state tariffing requirements. The American Public Communications Council ("APCC") had filed a motion on March 26, 1997, asking the FCC to rule that RBOCs were ineligible to receive payphone compensation because they had not made the state filings required by paragraphs 162-163 of the Reconsideration Order. *Id.*, ¶ 26. The RBOC Coalition argued in response that under the FCC's previous orders, the new services test applied only to the unbundled elements of lines used for "dumb" payphones. *Id.*, ¶ 27. The FCC denied APCC's motion, although it disagreed with the RBOC Coalition's interpretation of the Reconsideration Order. The FCC emphasized that LECs were required to have state tariffs for basic payphone services that comply with the new services test effective by April 15, 1997, in order to qualify for payphone compensation for that state. *Id.*, ¶ 30. In response to the APCC's and certain IXCs' claims that RBOCs' state tariffs did not meet the federal requirements, the FCC noted that: "Any party who believes that a particular LEC's

intrastate tariffs fail to meet these requirements has the option of filing a complaint with the Commission [the FCC]." *Id.*, n.93. The FCC did not establish any remedy, such as a refund, in the event such a complaint were filed.

4. The Waiver Order

On April 10, 1997, the RBOC Coalition⁴ and Ameritech requested that the FCC grant a limited waiver to extend the requirement for LECs to file intrastate tariffs that comply with the federal guidelines, specifically the new services test, to May 19, 1997. The Coalition stated that "none of us" understood the previous payphone orders to require existing, previously tariffed intrastate payphone services to meet the new services test. Ex parte filing of Michael K. Kellogg, dated April 10, 1997, Ex. 1 to the Affidavit of Lawrence Reichman, at 1. Rather, they understood that the new services test applied only to new services, such as an access line for "dumb" payphones, and did not learn otherwise until the Clarification Order. *Id.*

Significantly, the Coalition was confident that new tariff filings would be the exception rather than the rule:

In most States, ensuring that *previously tariffed* payphone services meet the "new services" test . . . should not be too problematic. We are gathering the relevant cost information and will be prepared to certify that *those tariffs* satisfy the costing standards of the "new services" test. In some States, however, there may be a discrepancy between the existing state tariff rate and the "new services" test; as a result, new tariff rates may have to be filed.

Id. at 1 (emphasis added). The Coalition indicated that its members would review cost data for existing tariffed services and either certify that the services met the new services test *or* file new tariffs by May 19, 1997. Indeed, the Coalition suggested that in some states the existing rates might be too low. *Id.* at 1-2. The Coalition indicated that this extension would permit the LECs

⁴ The RBOC Coalition consisted of all RBOCs except Ameritech. Waiver Order, n.7.

"to file new intrastate tariffs *in the states where it is necessary . . .*" Waiver Order, ¶ 14 (emphasis added).

The RBOCs also committed to reimburse customers purchasing services back to April 15, 1997, "to the extent that the new tariff rates are lower than the existing ones." *Id.* The RBOCs made clear that the offer to make a refund provided a remedy beyond what the FCC or a state commission could order. In its April 10, 1997 ex parte filing, the RBOC Coalition noted that "the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment." Ex. 1 to the Affidavit of Lawrence Reichman, at 2. The Coalition, thus, voluntarily undertook to provide the refund specified in the Waiver Order. Given the voluntary nature of this refund offer, the refund obligation should be construed narrowly.

The Coalition clarified in an April 11, 1997 FCC filing that the RBOCs did not request an extension of the requirement that they have intrastate tariffs for basic payphone lines and unbundled features effective by April 15, 1997, but only of the requirement that such rates comply with the new services test. Waiver Order, ¶ 13. In that April 11 filing, the Coalition reiterated the basis for its waiver request and the nature of its refund offer:

The waiver will allow LECs 45 days (from the April 4 Order) to gather the relevant cost information and either be prepared to certify that the existing tariffs satisfy the costing standards of the "new services" test *or to file new or revised tariffs* that do satisfy those standards. Furthermore, as noted, *where new or revised tariffs are required* and the new rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.

Ex parte filing of Michael K. Kellogg, dated April 11, 1997, Ex. 2 to the Affidavit of Lawrence Reichman, at 1 (emphasis added). The Coalition could not have been clearer in stating that its offer to make a refund applied only in situations where LECs filed "new or revised tariffs" in the 45 days following April 4, 1997.

The FCC granted the request and extended the time for LECs to file intrastate tariffs for payphone services that comply with the federal guidelines to May 19, 1997, in order to be

9- QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM

eligible to receive payphone compensation as of April 15, 1997. Waiver Order, ¶ 19. The waiver required LECs to "have in place intrastate tariffs for payphone services that are effective by April 15, 1997," even if they did not comply with the federal requirements. *Id.* Finally, the FCC ordered that: "A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates." *Id.*, ¶ 25. This was intended to "mitigate any delay in having in effect intrastate tariffs that comply with the guidelines . . . , including the concern raised by MCI that the subsidies from payphone services will not have been removed before the LECs receive payphone compensation." *Id.*, ¶ 20. The FCC emphasized that the waiver "is for a limited duration to address a specific compliance issue" and rejected APCC's proposal that LECs be required to re-file all intrastate rates. *Id.*, ¶ 21.

The Waiver Order is the only one of the payphone orders that requires a refund, and then only in very limited circumstances. Under the Waiver Order, only a LEC who relied upon the extension granted thereby could be required to make a refund, and then only to the extent that the newly tariffed rates were lower than the rates existing on April 15, 1997. A LEC could rely upon the Waiver Order only by making a new or revised payphone tariff filing in the 45 days between April 4 and May 19, 1997. LECs who made no such tariff filings in that time period simply did not rely upon the Waiver Order in any respect and cannot be required to make any refund. The Reconsideration Order, which had no refund obligation, had required LECs to be able to certify their compliance with the federal requirements by April 15, 1997 to receive payphone compensation. That order also permitted such certification to be based upon pre-existing tariffs. In requesting the limited waiver, the RBOC Coalition stated that its members would *either* certify that their existing payphone services met the new services test *or* file new or revised tariffs by May 19, 1997. The refund obligation, however, applied only to those RBOCs who filed new or revised tariffs by May 19, 1997, not to those who certified compliance based upon previous filings.

10- QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM

B. Qwest's Oregon Compliance with the Payphone Orders

Qwest's Oregon tariff filings were made pursuant to the payphone orders that preceded the Waiver Order. Qwest did not rely upon the Waiver Order in any respect and, thus, is not liable to make any refund in this case.

1. PUC filings

On January 15, 1997, Qwest filed Advice No. 1668 with the Oregon Commission, with a proposed effective date of April 15, 1997. Ex. 1 to the Affidavit of Sheila M. Harris. This filing introduced tariffs for Smart PAL (access lines for "dumb" payphones) "to meet the requirements in" the FCC's payphone orders, expressly including paragraph 163 of the Reconsideration Order. *Id.* at 1. It also withdrew tariff language that imposed operational regulations on PSP pay telephones. The advice letter recites that Qwest currently offers a Basic PAL line, and does not indicate that any changes to those rates are being made. *Id.* at 1.

The Commission considered this tariff filing at its April 1, 1997 public meeting. All of the LECs operating in Oregon had submitted filings to the PUC to comply with the payphone orders. Specifically, Staff noted that the four fully regulated telecommunications utilities and 12 partially regulated utilities who are required to file tariffs made tariff filings. In addition, the four other partially regulated utilities and 11 cooperatives filed letters indicating how they intended to comply with the payphone orders. Transcript of Public Meeting of Oregon PUC, April 1, 1997, Ex. 3 to the Affidavit of Lawrence Reichman, at 1. Each of the filings had in common the addition of a payphone access line that could be used with "dumb" payphones, in the case of U S WEST, a "Smart PAL."⁵ *Id.* No party disputed Qwest's compliance with the payphone orders or objected to Staff's recommendation. *Id.* Based on Staff's recommendation,

⁵ Staff raised a concern that U S WEST did not introduce a flat-rated Smart PAL, but only one on a measured basis. *See* Staff Report for April 1, 1997 Public Meeting, Ex. 4 to the Affidavit of Lawrence Reichman. This concern was not based on Section 276 or the payphone orders. In response, U S WEST agreed to introduce a "semi-flat PAL" (a measured line with a 300-call allowance) with a filing by September 12, 1997, to be effective October 15. *Id.*

the Commission decided that Qwest's tariffs would become effective on April 15, 1997, as requested by Qwest. *Id.* at 4; *see also* Ex. 2 to the Affidavit of Sheila M. Harris.⁶

Qwest made no additional Oregon tariff filings relating to payphone service until September 16, 1997, when Qwest filed Advice No. 1689. Affidavit of Sheila M. Harris, ¶ 4. That tariff filing introduced a flat-rated Basic PAL, reduced the rate of Smart PAL, and removed a restriction on subscribing to flat-rated Smart PAL. The advice letter states that filing was made to comply with 1997's Oregon House Bill 3168 (codified at ORS 759.235) which had an effective date of October 4, 1997, and prohibited measured-only service.⁷ *Id.*, Ex. 3 at 1.

Qwest relied upon its January 15, 1997 filing and its existing tariffs to comply with the payphone orders, and did not rely upon the extension granted in the Waiver Order in any respect. Qwest's certification of its compliance with the federal requirements confirms this.

2. Qwest's certification of compliance with the payphone orders

On May 20, 1997, Qwest certified to IXC's its compliance with the FCC's four-part payphone test and its eligibility to receive interim compensation as of April 15, 1997 in 13 of its 14 states (all states except New Mexico). Letter dated May 20, 1997 from Frank H. Hatzenbuehler of U S WEST to IXC's, Ex. 5 to the Affidavit of Lawrence Reichman. Specifically, Qwest certified, among other things, that it has "effective intrastate tariffs reflecting the removal of charges that recover the cost of payphones and any intrastate subsidies" and that "it has in effect intrastate tariffs for basic payphone services (for 'dumb' and 'smart' payphones)." *Id.* at 1. Further, Qwest certified that "it has effective intrastate payphone services tariffs which are cost-based, consistent with the requirements of Section 276, nondiscriminatory and

⁶ Also based on Staff's recommendation, the Commission decided to suspend the tariff filings of utilities Pacific Telecom, Inc. and United Telephone Company of the Northwest. Affidavit of Lawrence Reichman, ¶ 5. Accordingly, these LECs apparently did not have effective payphone tariffs by April 15, 1997, as required by the payphone orders.

⁷ That filing satisfied U S WEST's previous commitment to offer a "semi-flat" Smart PAL.

consistent with the Computer III guidelines [i.e., the new services test]." *Id.* at 2. Attached to the letter was a matrix demonstrating compliance for the 13 states. For Oregon, the matrix noted that no adjustment to the existing rates was required because "[a] specific analysis of payphone revenue to costs shows there is no payphone subsidy." *Id.* at 10. It also noted that Qwest complied with the intrastate tariff filings for Oregon by filing Advice No. 1668 on January 15, 1997, which was approved on April 1, 1997 and effective April 15, 1997. *Id.* at 11.

The FCC had occasion to determine the sufficiency of Qwest's self-certification. MCI had refused to pay Qwest payphone compensation, arguing that Qwest's certification was inadequate. Qwest filed a complaint with the FCC to recover compensation. The FCC Common Carrier Bureau specifically reviewed Qwest's May 20, 1997 letter to IXC's and concluded that it "clearly met" the FCC's requirements, and that MCI had no basis to refuse to pay compensation. *In the Matter of Ameritech Illinois, U S WEST Communications, Inc. et al. v. MCI Telecommunications Corporation*, DA 99-2449, 14 FCC Rcd 18643 (1999). The Bureau noted that there is no exception to IXC's obligation to pay compensation after receiving the LEC's certification. "IXC's questioning the veracity of a LEC's certification may challenge the LEC's compliance by initiating a proceeding at the Commission. . . . Determination of the sufficiency of the LEC's compliance, however, is a function solely within the Commission's and state's jurisdiction." *Id.*, ¶¶ 26-27.

C. Qwest Did Not Rely Upon the Waiver Order

NPCC's extraordinary claim for a refund of PAL rates paid by its members from April 15, 1997 through some date in 2005 is based on a fundamental mischaracterization of the Waiver Order and a complete disregard of the facts relating to Qwest's intrastate tariff filings made to comply with the payphone orders. NPCC claims that the Waiver Order requires BOCs to refund payphone service rates paid by PSPs from April 15, 1997 until such time as a state commission establishes payphone rates that comply with all federal requirements, "whenever that may occur." NPCC's Motion at 10. NPCC's argument would turn the simple 45-day extension to file

13- QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM

tariffs granted by the Waiver Order into an open-ended obligation, triggered only by a final determination that rates, whenever filed, comply with the new services test. In this case, NPCC claims that Qwest's PAL rates will not comply with the new services test until the Commission resets those rates pursuant to the Court of Appeals' recent decision in *Northwest Public Communications Council v. PUC*, 196 Or App 94, 100 P3d 776 (2004). NPCC's claim is without merit because the Waiver Order does not provide such extraordinarily broad relief.

First, the Waiver Order imposes a refund obligation only on a LEC "who seeks to rely on the waiver granted in" the order. Waiver Order, ¶ 25. The waiver granted in the order was of the requirement that LECs *file* intrastate tariffs that they believe comply with the new services test by January 15, 1997, to be effective by April 15, 1997. The waiver was also limited in that it extended the time *for such filings* only to May 19, 1997. The FCC expressly left open the possibility that LECs could determine that their existing tariffs complied with the new services test and be able to certify as such by May 19, 1997, without having to make any additional filing, and with no obligation to make a refund. Thus, the only LECs who relied on the Waiver Order were those who filed state payphone tariffs between April 4 and May 19, 1997, to comply with the new services test. LECs who relied on their existing tariffs, and made their certifications on that basis, did not rely on the Waiver Order in any respect.

Qwest did not rely on the Waiver Order because it made no additional Oregon payphone filings after January 15, 1997 and before May 19, 1997. It is clear from the undisputed facts that on January 15, 1997, Qwest made a tariff filing in Oregon to comply with the payphone orders. Pursuant to the Commission's order, that tariff filing was effective on April 15, 1997. Further, Qwest made no other tariff filings relating to payphone service between January 15, 1997 and May 19, 1997. Thus, notwithstanding the extension the FCC made available in the Waiver Order, Qwest chose to rely upon its January 15, 1997 filing and its existing tariffs to comply with the payphone orders, and did not rely upon the Waiver Order in any respect.

14- QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM

Second, the potential refund obligation of the Waiver Order applied only to "situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates." Waiver Order, ¶ 25. The "newly tariffed rates" referenced in that sentence are the rates that a LEC relying on the waiver would have filed during the time period between April 4, 1997 and May 19, 1997.⁸ The refund obligation was intended to mitigate the advantage that a LEC would have by receiving payphone compensation as of April 15, 1997, even though its new payphone service rates would not be effective until a later date. The only LECs that could receive payphone compensation as of April 15, 1997, however, were those LECs who could certify that they had filed compliant state tariffs by May 19, 1997. Of this group, only those LECs that relied upon the Waiver Order by filing tariffs between April 4 and May 19, 1997, were obligated to make a refund. When Qwest certified its compliance with the payphone orders on May 20, 1997, it did so based upon its tariffs filed on January 15, 1997, and existing tariffs, and did not do so based upon any state tariffs filed after April 4, 1997. Thus, Qwest did not rely on the Waiver Order.

NPCC asserts that Qwest's Oregon payphone rates that were effective April 15, 1997 did not comply with the new services test, relying upon the Oregon Court of Appeals' recent decision remanding the payphone service rates approved by the Commission in 2001 in Docket UT 125 for further review under the new services test.⁹ Even if there is validity to NPCC's claim that Qwest's payphone rates did not comply with the new services test on April 15, 1997, that fact does not entitle NPCC's members to a refund under the Waiver Order because Qwest simply did not rely on it. The FCC made clear in its orders that a LEC only had to be able to certify its

⁸ The FCC could not know with certainty when such rates would become effective, as that would depend upon each state's process for making rates effective; however, it is clear that the time period for the refund was relatively short: between April 15, 1997 and the date when rates filed no later than May 19, 1997 became effective. Indeed, the FCC required states to act on tariffs filed pursuant to the Waiver Order within a reasonable period of time, and retained jurisdiction to review intrastate tariffs in the event a state did not act as required. Waiver Order, n.60.

⁹ The court's decision relies upon FCC orders from 2000 and 2002, and a 2003 court decision. 196 Or App at 99.

15- QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM

compliance with the payphone orders based upon effective tariffs to receive compensation; any issues about whether the LEC's rates actually complied were to be addressed in a separate proceeding. Indeed, on numerous occasions in the payphone orders, the FCC indicated that parties who were not satisfied that a LEC's rates complied with the new services test had the opportunity to raise that issue in a complaint before the FCC or a state commission. NPCC did not challenge Qwest's payphone rates in 1997. In fact, NPCC never challenged the compliance of Qwest's rates with the payphone orders except in Qwest's last general rate case, Docket UT 125, and there raised specific challenges to Qwest's payphone rates for the first time in testimony prefiled on April 11, 2001. Affidavit of Lawrence Reichman, ¶ 10.

NPCC asserts that Qwest "took advantage of" its last general rate case, Docket UT 125, "to address its PAL rates" and that NPCC itself participated in that docket to "force Qwest to comply with federal law." NPCC's Motion at 4, 9. That is simply not true. Qwest addressed its payphone rates' compliance with federal law by its January 15, 1997 tariff filing and its May 20, 1997 certification of compliance. Moreover, the timing of Qwest's filings in UT 125 belies NPCC's argument that Qwest relied upon the Waiver Order. Qwest first filed its proposed rates, including payphone rates, in UT 125 on August 22, 1997, well past the May 19, 1997 extension date granted by the Waiver Order. Affidavit of Lawrence Reichman, ¶ 8. If Qwest were relying on that filing to satisfy the payphone orders, it would have been too late to qualify for payphone compensation as of April 15, 1997, and also could not have been in reliance upon the Waiver Order. As it were, Qwest did not rely upon its UT 125 filings to comply with the payphone orders; rather, Qwest's certification of compliance was based upon its January 15, 1997 tariff filing, which became effective April 15, 1997, and its existing tariffs, in compliance with the payphone orders *preceding* the Waiver Order. For all of these reasons, Qwest did not rely on the Waiver Order, and is not obligated to make any refund under that order.

The facts of this case are indistinguishable from those in a recent decision of a New York appellate court, the only reported case to address a disputed refund claim based upon the Waiver

Order. In *In the Matter of Independent Payphone Association of New York, Inc. v. Public Service Commission of the State of New York*, 5 AD3d 960, 774 NYS2d 197, *leave to appeal den'd*, 3 NY3d 607 (2004), the court decided that Verizon¹⁰ could not be required to refund portions of PAL rates because Verizon did not rely upon the Waiver Order, even if the rates Verizon relied upon in 1997 to comply with the FCC's payphone orders were later determined not to comply with the new services test. To comply with the FCC's payphone orders, Verizon filed with the New York PSC new rates for its "smart" payphone lines on January 15, 1997, to become effective on April 15, 1997, just as Qwest did in Oregon. Also like Qwest, Verizon left unchanged its rates for basic PALs. Verizon also was a member of the RBOC Coalition that requested the 45-day waiver granted by the FCC in the Waiver Order. Like Qwest, Verizon did not file any new tariffs by May 19, 1997, but continued to rely upon its pre-existing basic PAL rates to comply with the payphone orders.

The New York Supreme Court (the trial-level court), reviewing the New York PSC's approval of the payphone rates, remanded the basic PAL rates to the PSC to determine whether they comply with the new services test. The court also determined that Verizon would be required to refund PAL rates to the extent that new compliant rates were determined to be lower than the rates existing as of April 15, 1997. Verizon appealed this portion of the court's decision, and the Appellate Division reversed the refund requirement, concluding that Verizon did not rely upon the Waiver Order:

We differ with Supreme Court, however, with regard to its conclusion that petitioners will be entitled to a refund or credit in the event that the PSC concludes that new rates be established in accordance with the new services test and such rates prove to be lower than those presently in existence. The basis for Supreme Court's conclusion was a letter from representatives of Verizon's predecessor requesting an extension of time in which to review existing rates and file new rates if it were determined that the existing rates were not compliant with the new services test, proposing

¹⁰ "Verizon" includes Verizon's predecessor, the RBOC in New York.

an agreement to refund or provide a credit to PSPs for the difference if the newly filed rates were lower than existing rates and requesting an order of the Federal Communications Commission granting a 45-day extension for filing new rates and ordering a refund in the event such new rates were indeed lower than existing rates.^[11] *Suffice to say that new rates were not filed and the refund order was thus never effective.* The fact that the PSC's prior approval of the preexisting rates has now been judicially called into question and the matter has been remanded for further consideration cannot be the basis of potential refunds that were only agreed to and contemplated for a period ending May 19, 1997.

5 A.D.3d at 963-64 (emphasis added). This is the only case Qwest could find in which the applicability of the Waiver Order to a refund claim was litigated.

The facts of the instant case are indistinguishable from those in the Verizon-New York case. Qwest filed new Smart PAL rates in Oregon on January 15, 1997, and relied upon its existing basic PAL rates to satisfy the federal requirements. While Qwest also had the benefit of the Waiver Order, Qwest did not rely upon the Waiver Order because it did not file any new payphone tariffs by May 19, 1997. And even though a court has remanded Qwest's existing PAL rates to the Commission for application of the new services test, no refund is available since Qwest did not rely upon the Waiver Order. Thus, NPCC's Complaint should be dismissed.

D. The Cases NPCC Relies Upon Are Clearly Distinguishable

NPCC cites decisions from six non-Qwest states ordering refunds of payphone rates to support its argument that the Commission should do the same here. NPCC's Motion at 10. In none of NPCC's cases did a LEC contest its liability to make a refund under the Waiver Order. A review of those cases demonstrates that, as distinguished from Qwest, the RBOC at issue *did* rely upon the Waiver Order, or the refund was not based upon the Waiver Order.

Of the six cases, four involve BellSouth, which filed tariffs on May 19, 1997, in reliance upon the Waiver Order, and did not dispute its obligation to make a refund. The Tennessee

¹¹ Although the decision does not specify, this letter is undoubtedly the April 10, 1997 *ex parte* filing by the RBOC Coalition discussed above. See section II.A.4.

Commission stated in its decision: "The LECs in this docket acted pursuant to the waiver. BellSouth requested certification of its existing tariff as compliant *by filing a tariff on May 19, 1997*. UTSE [another LEC] filed a tariff on May 19, 1997." *In re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, 2001 Tenn. PUC LEXIS 74, *42 (emphasis added). BellSouth did not dispute its refund obligation in that case. Similarly, the Louisiana proceeding cited by NPCC "was initiated on May 19, 1997 upon BellSouth Telecommunications, Inc.'s filing of a new payphone tariff and cost studies." Louisiana Public Service Commission Ex Parte Order No. U-22632, 2001 La. PUC LEXIS 181, *1. In that case, BellSouth stipulated to making refunds. BellSouth also did not dispute its liability for a refund in South Carolina, where the Commission stated: "By May 19, 1997, BellSouth filed tariffs with the Commission that it contended were in compliance with the 1996 Act requirements, as implemented by the FCC. *Re BellSouth Telecommunications, Inc.*, Docket No. 97-124-C, Order No. 1999-285, South Carolina Public Service Commission, 1999 WL 595213 (1999). Finally, in Kentucky, "BellSouth agreed that if the Commission changed the payphone rates, refunds will be made back to April 15, 1997." *In the Matter of Deregulation of Local Exchange Companies' Payphone Service*, Administrative Case No. 361 (Ky. PSC Jan. 5, 1999) (this order is cited in the 2003 order NPCC cites). The Kentucky decisions do not indicate the date that BellSouth filed payphone tariffs in Kentucky; however, the fact that BellSouth agreed to make refunds negates any precedential value of this decision.

The other two cases NPCC cites also do not support its argument. The refund in the Michigan case was clearly based upon state law, not the FCC's Waiver Order.

The Commission further finds that it has the authority to order refunds pursuant to Section 601 of the MTA [Michigan Telecommunications Act]. To the extent that SBC and Verizon have collected excessive rates, there has been a violation of Section 318(2) of the MTA, which has resulted in economic damage to the MPTA members. Thus, refunds are authorized.

19- QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM

In the Matter of the Complaint of Michigan Pay Telephone Association et al. against Ameritech Michigan and GTE North Inc., 2004 Mich. PSC LEXIS 65, *42, 232 PUR 4th 122. The Michigan Commission did not cite the Waiver Order as authority for the refund ordered. Moreover, the sections of Michigan law the Commission did rely upon are very specific and have no Oregon analogues. Section 318(2) of the MTA provides: "A provider of payphone service shall comply with all nonstructural safeguards adopted by the Federal Communications Commission for payphone service." MCLA 484.2318(2). Section 601 of the MTA authorizes the commission to order remedies, including refunds, if a person has violated the MTA. MCLA 484.2601. The Oregon statutes have no comparable provisions upon which NPCC could seek a refund, nor does NPCC rely upon Oregon law in its Complaint.

Finally, the Pennsylvania decision cited by NPCC simply approves a settlement between the ILEC and the payphone association that, among other things, included a refund dating back to April 15, 1997. Not only does this settlement have no precedential value, the facts recited in the decision show the ILEC's reliance upon the Waiver Order. In that case, the ILEC apparently relied upon amended tariffs it filed following the Waiver Order to comply with the federal requirements. Thus, none of the cases cited by NPCC supports its position in this case. Indeed, the only reported decision on point, involving Verizon-New York, clearly favors Qwest.

E. Oregon Law Prohibits a Refund

While it is clear that NPCC relies primarily, if not exclusively, on the Waiver Order in seeking a refund for its members, it mentions in its motion that "fundamental fairness" also requires Qwest to make a refund. NPCC's Motion at 10. NPCC's Complaint, however, relies solely upon the Waiver Order in requesting a refund, Complaint at 7, and the Commission should not consider any other basis for its claim. Even if the Commission were to consider a legal basis other than the Waiver Order, NPCC still cannot establish a claim for refund. Given the filed rate doctrine, as well as the well articulated law in Oregon limiting the availability of refunds to certain prescribed circumstances, NPCC cannot establish a basis for a refund under Oregon law.

Under Oregon statutes, Qwest must charge and collect the exact amount specified in any tariff in force at the time service is rendered. ORS 759.205 and 759.260. "[R]ates that have been approved and are in force may be adjusted only pursuant to the process described in the statutes." *Pacific Northwest Bell Tele. Co. v. Eachus*, 135 Or App 41, 49, 898 P2d 774 (1995), *rev. den.* 322 Or 193, 903 P2d 886 (1995). The purpose of the filed-rate doctrine is to prohibit a utility from discriminating against some customers and in favor of others. "The filed-rate doctrine bars only an action that seeks to vary the terms of an applicable tariff. . . . Thus, the effect of a tariff on a particular claim depends on the nature of the claim and the specific terms of the tariff. If the claim is one that implicates the provisions of a tariff, then the tariff controls according to its terms, which may either limit relief available or bar a claim entirely." *Adamson v. WorldCom Communications, Inc.*, 190 Or App 215, 222, 78 P3d 577 (2003). The rates that NPCC seeks refunded were charged by Qwest pursuant to its effective tariffs. The filed rate doctrine bars NPCC's claim for a refund.

Not only does Oregon law require utilities to charge, and customers to pay, lawfully tariffed rates, it also restricts the circumstances in which rate refunds may be required. The Commission's express statutory authority to order refunds is limited to situations where a telecommunications utility files new rates that would increase its revenue, the Commission is required or determines to conduct a hearing regarding them, but does not order a suspension prior to investigating them. ORS 759.185(4). In only those circumstances, the Commission has express authority to order a refund if the rates it finally approves are lower than the rates that initially went into effect. This statute does not apply to the situation under consideration here, since the rates did not increase Qwest's revenue and the Commission was neither required to nor determined to investigate the rates.

There is no basis for NPCC to seek a refund in this case other than under the Waiver Order, which provides no relief to NPCC's members. There is no basis in Oregon law or any PUC order for a refund, and the filed rate doctrine bars any claim for an additional refund.

21- QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM

F. NPCC's Claim Is Barred by the Two-Year Statute of Limitations

NPCC filed its Complaint seeking a refund in this proceeding on May 11, 2001, more than four years after Qwest's PAL rates became effective and after Qwest certified that its Oregon PAL rates complied with the federal requirements. Federal law, however, requires parties to file complaints against carriers seeking monetary damages within two years after the claim accrues. Even if NPCC had a claim to pursue, it accrued on April 15, 1997, when federal law required intrastate PAL rates to comply with the new services test and other requirements. PSPs in many other states filed timely complaints challenging PAL rates. NPCC's claim is time-barred, since it was not brought within the two-year period.

47 U.S.C. § 415(b) establishes a two-year statute of limitations for claims against carriers for the recovery of damages not based on overcharges.¹² NPCC's claim is a claim against a carrier (Qwest) for damages (refunds), and NPCC (or its members), therefore, was required to bring such a claim within two years of the claim's accrual or suffer a time-bar. NPCC's claim is based upon its allegation that Qwest's PAL rates that were effective April 15, 1997 did not comply with the new services test, and thus its members paid too much for such services as of that date. Under these circumstances, the claim necessarily accrued as of April 15, 1997. Since NPCC's claim is based solely upon federal requirements and an FCC order, it must be governed by the federal statute of limitations. NPCC's complaint, filed more than four years after it accrued, simply came too late.

Not only did NPCC fail to file a damages claim for four years, it also chose not to challenge Qwest's proposed rates at the time they were filed in 1997. Many other payphone associations and PSPs challenged payphone rates that LECs used to comply with the payphone orders at the time they were filed in the early part of 1997, as demonstrated simply by looking at

¹² Overcharges are defined as charges in excess of FCC tariffed rates, which is not the basis of NPCC's claim in this case. 47 U.S.C. § 415(g).

the cases that NPCC cited that are discussed in section II.D. above. For example, in the BellSouth South Carolina case, on April 4, 1997, the South Carolina Public Communications Association asserted that BellSouth's proposed rates did not comply with the payphone orders, and requested that the commission stay the effectiveness of the rates and investigate them. The Tennessee Payphone Owners Association intervened in BellSouth's Tennessee proceeding on March 14, 1997. In Kentucky, on April 15, 1997, a PSP and the Kentucky Payphone Association filed a complaint alleging that the LECs' payphone rates did not meet the new services test. In Pennsylvania, the payphone association filed a complaint challenging the ILECs' payphone rates on March 11, 1997.

Closer to home, in Washington, MCI and AT&T challenged Qwest's compliance with the payphone orders by filing a complaint on April 16, 1997, the day after Qwest's rates became effective. *MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, Docket No. UT-970658, 1999 WL 359773 (WUTC, 5th Supp. Order, Mar. 23, 1999).¹³ In fact, MCI was represented in that proceeding by the same attorneys who represent NPCC in this case, and who represented NPCC in Oregon at that time in Qwest's then-pending rate case. In contrast to all of these cases, neither NPCC nor any of its members challenged Qwest's payphone rates when they were proposed in January 1997 or after they were approved in April 1997. By waiting more than four years to seek a refund, NPCC simply missed its chance to assert this claim.

NPCC will likely argue that it chose not to challenge Qwest's payphone tariff filings because it intended to challenge the PAL rates in Qwest's then-pending rate case, UT 125. Such an argument, of course, provides no excuse for missing the statute of limitations for a damages claim. Moreover, NPCC could have challenged the payphone rates outside of the rate case, as

¹³ These IXCs challenged U S WEST's intrastate access charges, not its payphone rates; thus, no issue was presented under the Waiver Order. Significantly, the Staff witness in that case testified that U S WEST *had* met the FCC's requirements with respect to intrastate tariffs for basic payphone services. 1999 WL 359773 at *7.

the FCC, in the payphone orders, repeatedly invited parties to do if they believed that LECs were not in compliance with those orders. Qwest filed the payphone rates as separate tariffs even though a rate case was pending. In fact, NPCC has argued that PAL rates are governed by different standards under federal law than typically apply in retail rate cases under state law. *Northwest Public Communications Council*, 196 Or App at 97 ("[NPCC] argues that federal law requires the PUC to use a different rate-setting method for payphone services instead of the traditional method that the PUC used.") Thus, NPCC could have challenged Qwest's proposed PAL rates in April 1997, as did many other PSPs and PSP associations around the country. Its failure to do so for more than four years causes its Complaint to be time-barred.

G. NPCC's Claim Is Barred by Res Judicata

While NPCC did not file its Complaint in this case for more than four years after its claim accrued, it did assert this same claim in another case (albeit also after the two-year statute of limitations had run). In Order No. 00-190 in combined Docket UT 125/UT 80, the Commission considered whether to adopt a stipulation between U S WEST and Staff to settle the revenue requirement issues in UT 125 and to determine the nature of the refund that Qwest should be required to make in those cases. The stipulation had provided for Qwest to make refunds only to its current customers as of the date of the refund. NPCC opposed that portion of the stipulation, and argued that refunds should also be made to former customers. NPCC argued in the alternative that if refunds were not made to *all* former customers, they should still be made to former customers who were PSPs.

NPCC specifically relied upon the Waiver Order as one basis of its claim that PSPs who were former customers of U S WEST should receive a refund. *See* Brief of Northwest Payphone Association, Ex. 6 to the Affidavit of Lawrence Reichman, at 5. The Commission did decide to revise that portion of the stipulation, and required Qwest to make refunds to all former customers. Order No. 00-190, at 15-17. As a result, NPCC's members have already received substantial refunds for rates charged during most of the time period for which they currently seek

a refund. PSPs who subscribed to PALs as of July 24, 2000 received refunds and credits in the amount of approximately \$434.79 per PAL, covering the time period May 1, 1996 through December 31, 2001, based upon the settlement of the UT 125/UT 80 revenue requirement and refund issues. Affidavit of Sheila M. Harris, ¶ 5. PSPs who formerly were PAL subscribers were also eligible for refunds in the amount of \$334.59 per PAL. The refunds and credits to PSPs totaled approximately \$2,624,251. *Id.* The Commission did not specifically rule on NPCC's claim in that docket, noting that the record did not contain enough evidence to decide that issue. Order No. 00-190 at 15. Nevertheless, NPCC made the claim and had the opportunity to support it if it chose to do so (subject, of course to the statute of limitations and other defenses). Thus, NPCC's current claim is barred by res judicata. *Bloomfield v. Weakland*, 193 Or App 784, 792-93, 92 P3d 749 (2004).

H. NPCC Lacks Standing To Seek Refunds for its Members

Finally, it is clear that NPCC does not have standing to seek a refund for its members in this case. ORS 756.500(2), governing Commission complaint proceedings, provides, in part:

It is not necessary that a complainant have a pecuniary interest in the matter in controversy or in the matter complained of, but the commission shall not grant any order of reparation to any person not a party to the proceedings in which such reparation order is made.

It is clear from NPCC's Motion that it does not purchase payphone services from Qwest and that it is seeking refunds not for itself, but for its members. NPCC's Motion at 1, 3. None of NPCC's members, however, is a party to this proceeding. Thus, the Commission cannot award reparations to any party in this case – neither to NPCC, which is not under any circumstance entitled to a refund, nor to its members, who are not parties to this proceeding. Thus, if the Commission does not grant Qwest summary judgment dismissing this case in its entirety, it should at least dismiss NPCC's claim for refunds.

III. CONCLUSION

For the foregoing reasons, the Commission should deny NPCC's motion for partial summary judgment and grant Qwest's motion for summary judgment, dismissing NPCC's Complaint.

DATED: January ____, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing QWEST'S SUMMARY JUDGMENT
OPENING MEMORANDUM on:

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by causing a full, true, and correct copy thereof, addressed to the last-known office address of the
attorney (except when served by fax), to be sent by the following indicated method or methods,
on the date set forth below:

☒ by **mailing** in a sealed, first-class postage-prepaid envelope and deposited
with the United States Postal Service at Portland, Oregon.

DATED: January _____, 2005.

PERKINS COIE LLP

By _____
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